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No. 91-1646

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ANTARES AIRCRAFT L.P.,

Petitioner,

vs.

FEDERAL REPUBLIC OF NIGERIA and
NIGERIAN AIRPORTS AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where Plaintiff alleges that the Nigerian Airports Authority converted Plaintiff's aircraft by temporarily preventing its removal from Nigeria until charges for landing, parking and refueling were paid, and where all of the allegedly wrongful conduct took place in Nigeria, does the resulting financial injury suffered by Plaintiff in this country constitute a "direct effect in the United States" for purposes of conferring subject matter jurisdiction under the Foreign Sovereign Immunities Act?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Federal Republic of Nigeria ("Nigeria") and Nigerian Airports Authority ("NAA") respectfully submit this Brief in Opposition to the Petition for a Writ of Certiorari filed by Antares Aircraft, L.P. ("Antares").

STATEMENT OF THE CASE

This action for conversion arises out of the temporary detention of a DC-8 airplane (the "Airplane") by the NAA for non-payment of landing and parking fees and fuel charges incurred at the Lagos, Nigeria airport. When the Airplane landed at the Lagos Airport and began accruing the charges that led to the detention, it was registered in Nigeria and was both owned

and operated by Expert Air, a Nigerian company. Antares' sole interest in the Airplane was as a mortgagee. After the Airplane had been on the ground accruing charges at the Lagos airport for more than two months, Antares re-acquired legal possession of the Airplane and sought to fly it out of Nigeria. By that time, several thousand dollars of unpaid charges had accrued.

The NAA refused to allow the Airplane to depart until all accrued and outstanding charges had been paid. Antares hired counsel in Nigeria and sent an additional representative to Nigeria to secure the release of the Airplane. All negotiations in this matter occurred in Nigeria over a period of several months ending in May 1989. Antares agreed to make, and made, a series of payments in Nigeria to the Nigerian authorities in Nigerian currency, in return for which the NAA released the Airplane. All of the payments were received in Nigeria. In May 1989, Antares hired a Canadian flight crew, flew the crew to Nigeria and had the crew fly the Airplane to Canada.

Antares claims in its Petition that NAA "directed" that a portion of the funds be transferred to a specific bank account in the United States. However, there is no support for that statement in the record. An affidavit submitted by Antares in the district court stated that funds were transferred from Antares' New York bank account to a California bank account designated by NAA as a "proper depository," but an exhibit attached to that affidavit revealed that this transfer was to a California account belonging to Antares' own lawyer. Consistent with this evidence, the district court found that "it has not been established that the NAA either demanded to be paid in the U.S. or actually obtained funds in the U.S." Opinion by Judge Martin, Petitioner's Appendix at C6.

In October 1989, Antares brought the instant action in the Southern District of New York alleging a conversion of the Airplane. Antares asserted subject matter jurisdiction under § 1605(a)(2) of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(2), based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. . . ." 28 U.S.C. § 1605(a)(2).

Both the district court and the United States Court of Appeals for the Second Circuit held that the defendants' commercial acts did not cause "a direct effect in the United States," and that the FSIA does not confer jurisdiction of this matter on the United States courts.

SUMMARY OF ARGUMENT

The Second Circuit decided in this case that the temporary detention in Nigeria of Antares' airplane by NAA, until charges for landing, parking and refueling were paid, did not cause a direct effect in the United States within the meaning of § 1605(a)(2) of the FSIA. The facts of the case were compelling. The temporary detention of the Airplane occurred in Nigeria; the landing, parking and refueling fees at issue were incurred in Nigeria by an aircraft which was registered in Nigeria and was operated and flown into Nigeria by a Nigerian company; all communications between the parties took place in Nigeria; the parties reached an agreement as to charges in Nigeria; and the payment of the charges was received by the NAA in Nigeria in Nigerian currency. The only connections with the United States were that Antares is an American partnership and that the charges were paid from Antares' New York bank account. The Second Circuit held that the direct effect of the detention of the aircraft occurred in Nigeria, and that the mere financial loss suffered by an American plaintiff as a result of a defendant's conduct abroad, was, by itself, insufficient to cause a direct effect in the United States within the meaning of the FSIA.

The decision of the Second Circuit is consistent with the decisions of every other Circuit which has considered whether personal injuries or injuries to tangible property suffered outside the United States by an American individual or business cause direct effects in the United States under § 1605(a)(2). None of the Circuit court decisions cited by Antares holds to the contrary. There is no conflict among the Circuits. Moreover, the result that Antares argues for would be intolerable and contrary to both the intent of Congress and the uniform holdings of the Circuits – it would subject a foreign sovereign to the jurisdiction of American courts every time it had commercial dealings with an American business, even if those dealings had absolutely no connection with the United States. Accordingly, the Petition for Certiorari should be denied.

ARGUMENT

I. CERTIORARI SHOULD BE DENIED. THE SECOND CIRCUIT'S OPINION DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS.

Antares seeks damages allegedly caused when the NAA temporarily detained Antares' Airplane in Nigeria for nonpayment of landing, parking and refueling charges incurred by the Airplane in Nigeria. The Second Circuit affirmed dismissal of the Complaint for lack of subject matter jurisdiction and properly held that defendants' conduct did not cause a direct effect in the United States within the meaning of § 1605(a)(2) of the FSIA. The court stated:

> In the instant case, the "legally significant act" — the detention of the aircraft — occurred in Nigeria. In addition, all negotiations concerning the fees due took place in Nigeria, and the bulk of the payments to the NAA were wired directly to the NAA's agent in Nigeria. Thus, although Antares is an American partnership, the effect of defendants' conduct abroad was not felt directly "in the United States" but in Nigeria. That is, the direct effect of detaining the plane was, as the district court found, the loss of the use of the aircraft and the physical damage it suffered *in Nigeria*, and not, as Antares alleges, the financial loss that Antares suffered in the United States.

Decision of Second Circuit, Petitioner's Appendix at A8-9 (emphasis in original).

The Second Circuit's decision is consistent with the decisions of every other Circuit that has considered cases in which an American citizen or American company has either traveled abroad or placed tangible assets into foreign commerce and then suffered injury outside of the United States. All of these Circuit courts have held that the financial loss suffered in the United States by American plaintiffs as a result of such injuries does not satisfy the direct effect requirement of section 1605(a)(2) of the FSIA. Accordingly, the courts have dismissed such cases

for lack of subject matter jurisdiction unless, unlike the case at bar, there were other substantial contacts with the United States. *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C. Cir. 1988); *Martin v. Republic of South Africa*, 836 F.2d 91 (2d Cir. 1987)[1]; *Zernicek v. Brown & Root, Inc.*, 826 F.2d 415 (5th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988) (same rule applies to individuals and companies); *Australian Government Aircraft Factories v. R.C. Lynne*, 743 F.2d 672 (9th Cir. 1984) *cert. denied*, 469 U.S. 1214 (1985); *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329 (9th Cir.), *cert. denied*, 469 U.S. 1035 (1984); *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3d Cir. 1980); *Upton v. Empire of Iran*, 459 F. Supp. 264, (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979).

For example, in *Australian Government Aircraft Factories*, *supra*, the defendant, an instrumentality of the Australian government, built an airplane, sold it to an American corporation named MAF, and was sued for damages by MAF when the airplane crashed in Indonesia. Like Antares, the American corporate plaintiff argued that the financial loss it suffered in this country as a result of the loss of its airplane satisfied the "direct effect" clause. This argument was flatly rejected:

> MAF seeks to impose liability on the defendants for the losses sustained from its purchase of an allegedly defective aircraft. The financial loss it seeks to recover, however, is not sufficiently "direct" to overcome the

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[1] Antares argues that the Second Circuit's opinion in the instant case is inconsistent with that court's other decisions on FSIA jurisdiction. Petition at 14-19. Antares' interpretation of the Second Circuit cases is incorrect, and the Second Circuit clearly did not believe that its decision in this case was in conflict with its prior decisions. The court stated that prior to the instant case it had not "squarely confronted the issue of whether there is a 'direct effect in the United States' when an American corporation or partnership suffers a financial loss in the United States as a result of a foreign state's conduct abroad." Decision of Second Circuit, Petitioner's Appendix at A7. In addition, the Second Circuit reviewed and rejected Antares' suggestion for rehearing *en banc*, which was based, in part, on Antares' claim that the Second Circuit was in conflict with its prior decisions. In any event, the correction of intra-circuit inconsistencies is not among the enumerated grounds for *certiorari* set forth in Supreme Court Rule 10.

> general rule of sovereign immunity. The direct effect of the alleged misconduct was the destruction of the aircraft and the loss of its use when it crashed in Indonesia. The financial loss, including the cost of replacement, which was sustained in the United States by MAF is an indirect consequence of the plane's destruction and the loss of its functional use.

743 F.2d at 675; *cf. Martin*, 836 F.2d 91 (2d Cir. 1987) (although plaintiff returned to the United States and incurred medical expenses here as a result of defendants' intentional failure to provide him with medical care in South Africa, the direct effect of defendants' conduct was in South Africa, not in the United States); *Gregorian v. Izvestia*, 871 F.2d 1515, 1527 (9th Cir.) *cert. denied*, 493 U.S. 891 (1989) ("mere financial loss suffered by a plaintiff in the United States as a result of the action abroad of a foreign state does not constitute a 'direct effect'...").

The reasoning of these cases applies with special force in the case at bar. All of the conduct giving rise to Antares' claim occurred in Nigeria, and the only connections with the United States were that Antares is an American partnership and the charges were paid from Antares' New York bank account. Indeed, Antares was not even operating the aircraft when it landed in Nigeria and began incurring landing and parking fees. The Airplane was registered in Nigeria and was operated and flown into Nigeria by a Nigerian company. Antares' only interest in the aircraft at that time was as a mortgagee.

Antares is incorrect when it argues that there is a conflict between the Second Circuit's decision in this case and the decisions in *Transamerican Steamship Corp. v. Somali Democratic Republic*, 767 F.2d 998 (D.C. Cir. 1985), *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985), *Gould v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th Cir. 1988), and *Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344 (11th Cir. 1982). There are important factual differences between the case at bar and each of those cases.

In *Transamerican*, the District of Columbia Circuit held that the detention of a ship by an Agency of the Somali Government had a direct effect in the United States, but the Court did not base its decision solely upon the fact that the ship belonged to an American plaintiff. Instead, the Court relied upon additional substantial contacts between the defendant's conduct and the United States of a kind not present in the case at bar. The court noted:

> At the Agency's insistence, a significant transaction was effectuated in the United States, with an American corporation transferring $28,000 from a New York bank to the Somali government's D.C. bank. In addition, as the district court found, the continued detention caused Transamerican to incur significant additional debts to the American vessel owner to the tune of $10,000 a day in time charter costs and related charges.

Transamerican Steamship Corp., 767 F.2d at 1004.

Moreover, in *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C. Cir. 1988), the D.C. Circuit commented upon its decision in *Transamerican* and made it clear that jurisdiction in *Transamerican* was not based solely on financial loss to an American plaintiff. The court stated:

> [I]n neither *Transamerican S.S.* nor *Texas Trading* was financial loss in this country itself sufficient. In each of these cases, something legally significant actually happened in the United States; a bank refused to pay on a letter of credit, money was transferred, a debt was incurred. In each case, therefore, the foreign sovereign caused a "substantial" and "direct and foreseeable" effect in the United States.

Zedan, 849 F.2d at 1515. There is no conflict between the *Transamerican* decision and the Second Circuit's decision below. The contacts with the United States which were necessary to FSIA jurisdiction in *Transamerican* are simply not present in the instant case.

Antares argues that in *Callejo*, 764 F.2d 1101 (5th Cir. 1985), the Fifth Circuit based FSIA jurisdiction solely upon the American citizenship of the plaintiffs. Antares, however, has misinterpreted the case. The plaintiffs – the Callejos – sought recovery against Bancomer, S.A., a Mexican national bank, for breaches of certificates of deposit. *Id.* at 1105. The court held that the breaches caused a "direct effect" in the United States under FSIA § 1605(a)(2) because of substantial contacts between defendant's conduct and the United States:

> Bancomer had engaged in a regular course of business conduct with the Callejos over a several-year period. It was well aware that it was dealing with American investors – it called them in the United States, mailed the certificates to them there, and remitted payments through an American correspondent bank.

764 F.2d at 1112. The Fifth Circuit was careful to distinguish the facts in *Callejo* from cases in which there was no jurisdiction under the FSIA because "the contacts with the United States were purely fortuitous in that they depended solely on the fact that the injured persons happen to be American." *Id.* at 1111. It is, therefore, erroneous to suggest that there is a conflict between the *Callejo* decision and the decision by the Second Circuit that Antares' financial loss did not by itself constitute a direct effect in the United States. The Fifth Circuit reenforced this point in *Zernicek*, where it discussed its previous decision in *Callejo* and cited the various contacts between defendant's conduct and the United States which led to the finding of jurisdiction in *Callejo*. *Zernicek*, 826 F.2d at 419.

Neither of the other cases relied upon by Antares, *Gould*, 853 F.2d 445 (6th Cir. 1988) and *Harris*, 691 F.2d 1344 (11th Cir. 1982), conflicts with the case at bar. In *Gould*, the plaintiff alleged that the foreign sovereign defendant had stolen and wrongfully used its trade secrets. *Gould*, 853 F.2d at 453. The *Gould* court expressly distinguished the facts before it from a case in which a United States corporation claims an injury from competition abroad and asserts its American domicile as the basis for jurisdiction under FSIA § 1605(a)(2). The court found that

defendant's theft of plaintiff's trade secrets would cause damage to plaintiff's United States operations, which depended upon and utilized the trade secrets, and that defendant's wrongful conduct was "not limited to competition in foreign markets." *Id.* In addition, defendant's course of conduct included meetings in the United States with a former American employee of plaintiff who was allegedly known by defendants to have wrongfully obtained the trade secrets.

Thus, in *Gould*, defendants misappropriated knowledge which belonged to plaintiff, which was utilized by plaintiff in the United States, which was protected by United States law and which was the basis for plaintiff's United States manufacturing operations. Clearly, the theft of trade secrets that plaintiff had held and used in the United States had a direct effect in the United States within the meaning of the FSIA. The case at bar, on the other hand, involves conduct which allegedly damaged tangible property located in Nigeria. The direct effect of such conduct was, as the Second Circuit held, in Nigeria, where the tangible property was located and used, and not in the United States.

In *Harris*, the plaintiff, an American corporation, established a letter of credit at an American bank at the direction of a foreign sovereign to guarantee a contract for the shipment of radio transmitters from the United States to Iran. Plaintiff brought suit to enjoin payment to the foreign sovereign under the letter of credit. 691 F.2d at 1346-47. The court held that "[t]he letter of credit arrangement - which was structured according to the wishes of the [sovereign] - extends into this country," and, therefore, that there was a direct effect in the United States. *Id.* at 1351. By contrast, in the instant case, the only connection with the United States is the presence of Antares and its bank account. All of the conduct giving rise to Antares' claim occurred in Nigeria.

As an additional point, Antares refers to two different formulations of the test for determining whether there is a "direct effect" in the United States under the FSIA. The Second Circuit has stated

that the issue to be determined is whether defendants' conduct was sufficiently direct and sufficiently in the United States that Congress would have wanted an American court to hear the case. *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). Other Circuits have held that a direct effect is one that is substantial and foreseeable. *See, e.g., Zernicek*, 826 F.2d 415 (5th Cir. 1987). And, in some decisions, courts have used both formulations without appearing to find any incompatability between them. *See, e.g. Callejo*, 764 F.2d at 1111 (5th Cir. 1985); *Gould*, 853 F.2d at 453 (6th Cir. 1988); *Harris*, 691 F.2d at 1351 (11th Cir. 1982).

The case at bar does not present the Supreme Court with an opportunity to determine whether this difference in formulation presents a conflict requiring resolution, because the application of either formulation to the present case would lead to the same result. Use of the "substantial and foreseeable" formulation has not made courts any more likely to find a direct effect in the United States where an American plaintiff seeks redress for personal injuries or injuries to tangible property occurring outside of the United States. *See, e.g., Zernicek*, 826 F.2d at 417-19; *Berkovitz*, 735 F.2d at 332; *Australian Government Aircraft Factories*, 743 F.2d at 674-75 (applying *Berkovitz*); *cf. Zedan*, 849 F.2d at 1515. All of the Circuits that have considered jurisdiction in these circumstances have regarded the financial loss suffered by the American plaintiff as too indirect to justify the exercise of jurisdiction under the FSIA.[2]

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[2] For the same reason, the outcome in *Republic of Argentina v. Weltover, Inc.*, *cert. granted* ___ U.S. ___, 112 S.Ct. 858 (1992) should have no effect on the instant case. The facts in *Weltover* include substantially greater contacts with the United States than are present here, *i.e.*, a bond that was to be paid in New York City. Moreover, even if this Court were to render a decision in *Weltover* which rejected the Second Circuit's formulation of the "direct effect" test, the outcome here would be the same. There is no jurisdiction under the FSIA here regardless of which formulation is used. *Cf. International Housing Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8, 11 n.2 (2d Cir. 1989) ("We believe this apparent difference between other circuits and us does not affect the outcome in this case because the effect here is neither 'direct' nor 'substantial' and 'foreseeable.' ").

CONCLUSION

Certiorari is inappropriate in this case. There is no inter-circuit conflict, and the Second Circuit's decision below is correct. The position that Antares urges is not only contrary to the decisions of the several circuits, but would expand jurisdiction under the FSIA beyond reason and beyond the intent of Congress. Foreign sovereigns should be subject to the jurisdiction of American courts only when their commercial activities have substantial contacts with the United States and not simply because they had commercial dealings outside the United States with an American plaintiff.

For the foregoing reasons, respondents Federal Republic of Nigeria and Nigerian Airports Authority respectfully request that the Petition for a Writ of Certiorari be denied.

May 29, 1992

Respectfully submitted,

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